STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On its Own Motion	)	Docket No. 15-0512
	)	
Amendment of 83 Ill. Adm. Code 412 and	)	
83 Ill. Adm. Code 453	)	

VERIFIED SURREPLY COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1], by and through its attorney, Gerard T. Fox, pursuant to the Administrative Law Judge's Ruling, hereby submits its Verified Surreply Comments in the above-captioned proceeding, the Illinois Commerce Commission's ("Commission") rule making proceeding to consider amendments to 83 Ill. Adm. Code Parts 412, Obligations of Retail Electric Suppliers, and 453, Internet Enrollment Rules.

I. INTRODUCTION

On November 5, 2015, RESA filed its Verified Initial Comments in this proceeding. Those Verified Initial Comments included two appendices. Appendix A contained RESA's proposed revisions to the Staff's Proposed Rules for Part 412. Appendix B contained RESA's proposed revisions to the Staff's Proposed Rules for Part 453. On November 19, 2015, RESA

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

filed its Verified Reply Comments in this proceeding. RESA received Verified Reply Comments from Ameren Illinois Company, Commonwealth Edison Company ("ComEd"), the Citizens Utility Board ("CUB"), the Environmental Law and Policy Center ("ELPC"), Ethical Electric, Inc. ("Ethical"); the Illinois Attorney General (the "AG"), the Staff of the Commission ("Staff"), the Illinois Competitive Energy Association ("ICEA"), Nicor Advanced Energy ("NAE"), and Starion Energy PA, Inc. In these Verified Surreply Comments, RESA addresses the Verified Reply Comments of Staff and some of the parties. In addition, RESA raises the issue of how much time should be given to Retail Electric Suppliers (individually "RES" and collectively "RESs") to implement any new rules that are ultimately adopted by the Commission and proposes a new Section 412.115, Compliance, which gives RESs approximately 12 months from the effective date of the rules to come into full compliance.

RESA has consistently taken the position since Docket 14-NOI-01, the Notice of Inquiry proceeding which resulted in the instant proceeding and throughout this proceeding, that there does not appear to be a need for adoption of additional rules. Instead, the Commission should utilize the authority it has under the Public Utilities Act to enforce its existing rules. Nothing in the Initial Comments or Reply Comments of any party, including the Staff, changes RESA's opinion in this regard. In particular, RESA questions the numerous substantive revisions proposed by Staff and other Parties, notably the AG and CUB, revisions which will be costly and burdensome for RESs to implement, but for which no Party has provided an explanation of how they would provide any meaningful benefit for customers. If the Commission decides to adopt additional rules in this proceeding, it should only adopt those for which there has been some justification.

II. GENERAL PRINCIPLES

Before responding to the Reply Comments of the Parties, RESA would like to re-emphasize the three general principles it made in its Initial and Reply Comments. As will be shown in detail in these Surreply Comments, the Reply Comments of Commission Staff and some other parties are inconsistent with these important principles.

A. Competitive Parity Should be Considered in this Rulemaking

When considering additional requirements in Illinois retail electric markets it is important to consider the effect such requirements have on the competitive parity between RES products and default supply service from utilities. Staff and some other Parties basically want to treat RESs as public utilities, and, in fact, add requirements for RESs beyond those applicable to public utilities. By doing this, they ignore the problem that by imposing burdens on RESs beyond those imposed on electric utilities, they are making it difficult, if not impossible, for RESs to compete with electric utilities. This problem is exacerbated by the fact that the costs of regulatory requirements that apply to utilities are recovered by them through their distribution rates, not their supply charges, in contrast to RESs which must recover their costs through their supply prices. RESs must compete against a default product that does not include the cost of regulatory requirements. Thus, the increased regulatory costs imposed on a RES disproportionately impact RES-provided service charges in comparison to utility default service.

ComEd argues that RESA's comments regarding competitive parity between RESs and utilities are outside the scope of this rulemaking. (ComEd VRC, pp. 8-9) However, ComEd's arguments miss the point that it is not marketing costs alone that create the difference. ComEd states that it does not market its supply service. (*Id.*, p. 8) The point is that it does not have to—a new customer who moves into the ComEd service territory in absence of a RES selection, is

placed on utility delivery and supply service; ComEd has virtually no acquisition costs, such as marketing, sales and product advertising. In contrast, RESs have substantial customer acquisition costs and have to recover those costs through their supply charges.

ComEd also points out that its supply costs are fixed through the Illinois Power Agency's procurement process. (*Id*.) However, again, ComEd misses the point. The simple fact is that the utility's all-in default price competes with a RES' price and to the extent that the Commission's rules are changed in a manner that loads additional costs on RESs which have to be recovered through their supply prices, their products become less competitive when compared to the utility's default price. Some customers shop to lower their per-unit costs and total bills so all costs and charges are, and should be, included in such a comparison. ComEd's default service competes with RES-provided service regardless of whether ComEd markets its products or has its wholesale costs developed through a competitive bid structure. Accordingly, any costs imposed on a RES, which would be the result if certain proposed rules in this proceeding were adopted, ultimately affect the competitiveness of RESs' offers versus the respective utilities' Price to Compare. If this is not the proper venue to discuss the substantial cost impacts and competitive nature of the retail electric market (including competitive parity between RESs and utilities) which nexus is at stake in this proceeding, than in what proceeding is ComEd suggesting the issue should be addressed?

Similarly, CUB takes the position that there is "no reasonable analogy to be made between RES supply and utility supply and thus the Commission should ignore any of RESA's proposed changes based on this premise [competitive parity]".[2] (CUB VRC, sixth page) The

[2] It is noteworthy that CUB's Website proffers a "Power Calculator [that] lets you compare alternative supply rates with regulated utility's rates in order to determine which plan will save most." http://www.cubpowercalculator.com/

analogy is as reasonable as it is simple.. As stated above, a RES product competes with the utility's default product. They compete because they are alternatives. The proposals of Staff, CUB and the AG to increase RESs' costs with unnecessary and burdensome requirements damage RESs' ability to compete with the utility's default price. Put another way, if the Commission had to approve specific dollar amounts to be recovered from customers for the costs of the proposed new regulations, then a reasonable balance between costs and benefits could be made. But that is not the case here; proponents seek benefits without taking into account the very real costs-to-customers of the changes.

B. The Commission should utilize the authority it has under the Public Utilities Act and its existing rules before considering the adoption of additional rules.

The AG attempts to dispute RESA's argument that the Commission should enforce its existing rules before adding additional requirements, faulting RESA for providing "no explanation of where the additional resources necessary to increase enforcement will come from in this era of extremely limited government budgets". (AG VRC, p. 7) RESA disagrees and would respond by asking the AG the same question—if resources are supposedly inadequate to enforce the existing rules, where are the additional resources necessary to enforce the additional requirements proposed by Staff and the AG supposed to come from? As one example, RESA points to the AG's proposed modification to Section 412.320 which basically would encourage customers to contact the Commission's Consumer Services Division ("CSD") even when they are satisfied with a RES' resolution of a complaint. This modification appears to seek conflict under circumstances where none exist, because the condition precedent is that the complaint has been resolved and the customer is satisfied. This creates a customer cost with no discernable benefit.

ComEd relies on the affidavit of Mr. Peter Muntaner and the Initial Comments of the AG and CUB to conclude that this "evidence not only warrants the adoption of the Proposed Amendments—it suggests that further strengthening of certain provisions may be appropriate". (ComEd VRC, p. 4) However, the Verified Reply Comments of RESA demonstrated that neither Mr. Muntaner's affidavit nor the rhetoric of the AG and CUB in their Verified Initial Comments (which ComEd refers to as "evidence") offers meaningful support for the burden of onerous additional requirements that would be imposed on RESs, without any demonstration of any benefit to RESs' customers.

In this regard, RESA notes that ICEA served its first set of data requests on Staff, requests which largely were directed to providing support for the allegations contained in Mr. Muntaner's affidavit. However, Staff's responses were non-responsive and provided no additional support for those allegations. For example, ICEA DR 1.04 requested, in part:

> For each of the years set forth in Paragraphs 7-10 [of Mr. Muntaner's affidavit], please identify the number of complaints that….did not involve a violation of the ICC's administrative rules, the Public Utilities Act, or the Consumer Fraud and Deceptive Business Practices Act but where Mr. Muntaner or CSD staff believed wrongdoing occurred by a RES for which the Commission lacked enforcement authority.

Staff's non-response was as follows: "CSD Staff does not conclusively determine whether violations of any statute or rule has taken place with respect to any consumer complaint or inquiry." While this may be true, Staff had the opportunity to provide support for its position that it needs additional rules on top of the existing rules, and declined to do so.

CUB resorts to rhetoric, rather than fact, when in attempting to justify the need for Staff's Proposed rules as augmented by the burdens of the AG's and CUB's proposals, by stating that "the Illinois electric market should not be made a game of catch me if you can…If abiding by the

proposed rules would made [sic] fewer RES willing to participate in the Illinois electric market, then there should be fewer suppliers marketing in Illinois". (CUB VRC, eighth page) The problem with the proposals of the Staff, CUB and AG in this proceeding is that they operate like a hatchet rather than a scalpel, harming all RESs not just those not abiding by the existing rules. There is no benefit to Illinois consumers of chasing those RESs abiding by the rules out of the state. In particular, CUB's ill-advised proposal regarding Purchase of Receivables programs (CUB VIC, fourteenth page) would make it impossible for many RESs to continue to market in Illinois.

Ironically, ComEd takes the position that the evidence put forth by Staff of complaints regarding RES conduct—according to ComEd, "over 6,300 complaints by Staff's count since 2012—demonstrates the need for revisions to Parts 412 and 453. (ComEd VRC, p. 1) First, ComEd overstates the number of complaints because the statistic offered by Staff is for "complaints" and "inquiries". Second, even with this overstatement, the 6,300 number for all RESs for a period of four years is only slightly less than the number of calls received about ComEd by the Commission's Consumer Services Division for a single year—approximately 5,700 for calendar year 2013 alone. Looking at calendar year 2013 alone, the number of contacts for ComEd is more than four times the number for all RESs combined. (CSD Annual Report for 2013, Nov. 5, 2014)

C. This Rulemaking Should not be Viewed as an Opportunity to Regulate, in effect, RES Prices.

The Commission does not have the authority to regulate the price RESs offer customers, nor to ban certain product offerings. Scrutiny must be given to proposals that would effectively ban product offerings, such as variable rates, by imposing numerous requirements relating to

variable offers, requirements which appear to add little value to customers while adding great expense to RESs.

III. STAFF AND OTHER PARTIES HAVE NOT DEMONSTRATED THAT THE COMMISSION HAS THE AUTHORITY TO ADOPT STAFF'S PROPOSED RULES.

In its Reply Comments, Staff states, incorrectly that RESA does not appear to challenge the Commission's authority to promulgate Staff's Proposed Rules. (Staff VRC, p. 2) This is not true (see RESA's VRC at pages 5-8) Staff goes on to reject the claim, which it attributes to RESA, that the Commission cannot adopt Staff's Proposed Rules if they do not benefit consumers. (*Id*.) It is not clear if Staff is arguing that the Commission has the authority to adopt consumer protection rules even if they don't protect consumers or if Staff goes so far as to say that the Commission can adopt consumer protection rules even if they hurt consumers, for example, by increasing costs to suppliers that will be passed on to customers.

In support of the Commission's authority to adopt Staff's Proposed Rules, Staff, the AG and CUB rely heavily on a recent opinion of the Fourth District Appellate Court in an appeal of a Commission order in an Ameren gas rate case (*Dominion Retail, Inc. v. Illinois Commerce Commission*, 2015 IL App (4th) 140173. (see, for example, Staff VRC, pp. 2-4) However, that opinion is completely inapposite. In *Ameren*, the Court held that the Commission had authority under Section 9-201 of the Public Utilities Act, to require Ameren, a public utility, to include certain consumer protections in a small volume transportation ("SVT") natural gas retail program. Section 9-201 gives the Commission the authority to suspend a public utility's tariff filing, hold hearings, and, at the conclusion of those hearing, to make any necessary revisions to the tariff filing to make it "just and reasonable". If Alternative Gas Suppliers want to participate

in the SVT Program, they would have to accept the consumer protections as a condition of their participation. In contrast, the instant proceeding is a rulemaking proceeding for all RESs. Section 9-201 does not give the Commission any authority over RESs. Staff also relies on *Dominion Retail* for the proposition that Staff does not need to provide evidence to support its Proposed Rules. (*Id*.) In resolving the issue of whether there was evidence to support the Commission's decision regarding the consumer protections, the Fourth District Appellate Court found that the consumer protections were "just and reasonable." However, the "just and reasonable" standard applies to utility tariff filings, it does not apply to rulemaking proceedings. These arguments ignore the requirement of Section 10-201 of the Public Utilities Act that Commission orders must be supported by substantial evidence.

ComEd accepts Staff's analysis that the Commission has the authority to promulgate Staff's Proposed Rules in this proceeding. (ComEd VRC, pp. 4-5) However, Staff's analysis is faulty and does not cite a single section of the Public Utilities Act that supports its position that the Commission has the authority to promulgate Staff's Proposed Rules. ComEd, apparently accepts Staff's position that the following sections of the Public Utilities Act could be used to support said authority:

- Section 8-501—this section only applies to public utilities (RESA VRC, pp. 5-6)
- Section 10-102—this section only applies to public utilities (*Id*.)
- Section 16-115A (e) (iv)—this subsection requires ARES to provide billing statements and annual statements; the Commission has already adopted rules setting forth these requirements in 83 Ill. Admin. Code Section 410.20
- Section 16-115C (a)-this subsection only applies to Agents, Brokers, and Consultants

- Section 16-117 (a) and (h)—Section 16-117 contains the consumer education program requirements imposed by the General Assembly; Subsection 16-117 (h) provides the Commission with authority to adopt a uniform disclosure form and RESA concedes that the Commission has this authority
- Section 16-118-this section sets forth requirements for electric utilities to provide services to ARES
- Section 16-121-this section requires the Commission to adopt rules to prevent electric utilities discriminating against ARES in order to subsidize or otherwise support the electric utilities' affiliated interests; the Commission has already utilized its authority under Section 16-121 in adopting 83 Ill. Admin. Code Part 450

In addition, ComEd unfairly criticizes ICEA for neglecting to "mention the statutory authority creating the Office of Retail Market Development". (ComEd VRC, p. 4) There is nothing in the Retail Electric Competition Act of 2006 which gives the Commission the authority to adopt the Staff's Proposed Rules.

ComEd incorrectly points to RESA as "essentially" conceding that the Commission has abundant authority. (ComEd VRC, p. 5) RESA did not make any such concession. RESA's point was that the Commission had authority under its existing rules to address the problems that the Commission Staff, CUB, the AG, and now, ComEd believe exist. However, the statutory analysis offered by Staff (which is not aided by ComEd's acceptance of it) caused RESA to state in its Verified Reply Comments that there are serious questions regarding the Commission's authority that RESA would like to have Staff address in its Surreply Comments.

In conclusion, the Commission, as a creature of statute, has no general powers except those expressly conferred by the legislature. As stated by the Illinois Supreme Court in *Business and Professional People*, "Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. [Citations] Such agencies have no general or common law powers." *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990).

IV. IF THE COMMISSION ADOPTS SUBSTANTIAL AMENDMENTS TO 83 ILL. ADMIN. CODE PART 412 IN THIS PROCEEDING, A NEW SECTION 412.15, COMPLIANCE, SHOULD BE ADDED.

Staff proposes numerous revisions to Part 412. Such revisions will require changes in documents, training of personnel, and computer programming. However, Staff has not addressed the issue of how much time RESs will need to comply with those extensive revisions. RESA recommends that RESs be given one-year from the date of the Commission's order adopting rules in this proceeding to comply with the amendments to Part 412.

The Commission provided public utilities over 18 months to comply fully with its amendments to 83 Ill. Admin. Code Part 280, Procedures for Gas, Electric, Water, and Sanitary Sewer Utilities Governing Eligibility for Service Deposits, Billing, Payments, Refunds, and Disconnections of Service, in its final order in Docket 06-0703, dated October 22, 2014. Section 280.15, Compliance, gives the utilities over 18 months to comply with those amendments. Similarly, the Commission should allow RESs at least 12 months to comply fully with revised Part 412 in this proceeding.

Accordingly, a new section 412.15, Compliance, should be added to Part 412, as follows:

The Commission shall require implementation of each requirement as quickly as reasonably practicable, but in no event later than [the first day of the month following 12 months from the date of the Commission's final order], unless the Commission grants an extension of time for cause.

V. STAFF AND OTHER PARTIES HAVE NOT DEMONSTRATED A NEED FOR THE BURDENSOME AND ONEROUS REQUIREMENTS THAT WOULD BE IMPOSED BY THE ADOPTION OF STAFF'S PROPOSED RULES OR THE PROPOSED AMENDMENTS OF OTHER PARTIES TO THOSE RULES.

In its Verified Reply Comments, CUB claims that its experience "mimics" the Staff's experience regarding customer complaints against RESs and offers its own statistics which attempt to justify the burdensome and costly additional requirements that Staff wants to add in its Proposed Rules. CUB's claim is correct, but not helpful to its argument, in that, as demonstrated in RESA's Reply Comments at pages 8-9, both informal and formal complaints for 2013 are much lower for all RESs combined, than for a single electric utility, ComEd. A comparison of CUB's complaint statistics from its Initial Comments and its Reply Comments demonstrates that CUB's claims are similarly misplaced. In its Initial Comments, CUB states its experience of answering roughly 10,000 utility and supplier customer calls per year. (CUB VIC, first page) However, CUB did not break down its interactions between those relating to suppliers (the proposed rules for which are the subject of this proceeding) and utilities. CUB does so in its Reply Comments, stating that CUB received 279 complaints regarding ARES in 2012, 366 in 2013, 1414 in 2014, and 661 in 2015 to date. (CUB VRC, third page) Consequently, roughly 3% of CUB's complaints in 2012 concerned RESs, about 4% of CUB's complaints in 2013 concerned RESs, about 14% of CUB's complaints in 2014 concerned RES, and (extrapolating through the end of 2015, about 7-8% pf CUB's complaints in 2015 would concern RESs. Thus,

CUB's own statistics suggest that the Commission Staff and CUB should be focusing their attention elsewhere.

VI. COMMENTS ON SPECIFIC PROPOSED AMENDMENTS TO STAFF'S PROPOSED RULES

Section 412.10, Definitions

In its Verified Reply Comments, RESA objected to proposals by AG and CUB to revise the definition of "Inbound enrollment call". (RESA VRC, p. 14) NAE provides additional reasons why those proposals should be rejected. (NAE VRC, p. 2) Staff states that it does not object to the AG's proposal to add the phrase "or change provision of their" to the definition to be consistent with language found in Section 412.140 (c). (Staff VRC, p. 5) RESA disagrees that the AG's vague language would be useful. For example, a customer might call to "change the provision of [his or her]" service by requesting a change in the billing address. This does not make the call an enrollment call.

The AG criticizes both ICEA and RESA for their positions that the Staff's proposed definition of "in-person solicitation" is overly broad, calling their examples of in-person contacts that would not appropriately be subjected to the same requirements as door-to-door sales as "concocted sales scenarios" (AG VRC, p.7) and "fabricated examples describing situations that are likely to occur only rarely". (*Id*., p. 8) However, those "contacted sales scenarios" and "fabricated examples" are the types of in-person contacts which Staff is attempting to include in its definition of "in-person solicitation". Thus, the AG's argument actually supports the position of RESA and ICEA.

CUB also opposes RESA's recommendation that the definition of "in person solicitation" be deleted, stating that CUB would be shocked if RESA could provide one example of this occurrence ever happening, referring to the situation where a customer goes to the RES place of business to enroll. (CUB VRC, ninth page). CUB's rhetoric is disingenuous. RESA identified numerous in person contacts that do not involve door-to-door solicitation, including the following:

- Permanent store location operated by a RES
- Temporary or seasonal kiosks, such as farmers markets, shopping malls, retail locations[3] or airports
- RES booths/tables at trade shows or community fairs or other venues to which the RES has been invited
- Pre-scheduled appointments
- In-home meetings through "family and friends" network marketing

Moreover, CUB's rhetoric is illogical. If the above in-person contacts did not occur, why would CUB propose that the Commission adopt rules setting forth requirements for such contacts? In these Surreply Comments regarding Section 412.120, RESA proposes a new section to cover in-person solicitations, other than door-to-door.

As technology continues to evolve so will circumstances in which solicitation occurs "in-person", but not in the mode of traditional door to door solicitation. Focus should not be placed solely on the manner in which a customer is acquired, but rather on the demonstration of customer consent to the enrollment, irrespective of the manner in which a customer is acquired.

[3] At least one RESA member company is conducting sales in Illinois in the stores of a major home improvement chain, a major brand department store and movie theaters.

As an example, digitized electronic signature can be captured, with customer consent, which mimics hard copy signatures which indisputably are considered illustrative of customer consent. If concerns persist due to the newness of this application of technology, corroboration of customer consent can be evinced through geo-location technology which can record the time and location of the enrollment to complement the electronic signature itself.

Staff states that it would like to receive further comments and suggest language regarding RESA's concepts of a "mobile data application" and "virtual wallet" enrollment. (Staff VRC, p. 8) RESA responds as follows.

Ultimately the goal is to move the shopping experience for energy services into the mainstream of consumerism. However, as more opportunities develop for customers to shop for energy services away from home (as described above), an issue of customer convenience arises.

A customer's utility account number is required to effectuate an enrollment for service with a RES. Customers do not readily know their multiple digit utility account number nor do they typically carry their utility bill with them to the mall. As a result, a customer may authorize a switch to a RES at the point of sale, but without their account number the customer cannot complete the enrollment and the RES cannot fulfill the customer's desire to make a switch in service provider. This results in the need for a follow up contact with the customer in order to obtain the missing account number. Customers routinely express frustration that they are contacted after the fact for a purchase they believe they have already completed. RESs who conduct face to face sales at locations away from customers' homes often hear the refrain, "Why are you bothering me? I signed up with your company a week ago at the farmers market."

In sum, customers are inconvenienced by the fact that they need an account number to exercise their right to shop for energy supply service when they do not have access to the information. Therefore to mitigate this inconvenience to customers RESA proposes an alternative to the account number, only in cases where the customer is shopping away from their residence and the customer has initiated the contact with a RES. Customers in these circumstances should be allowed provide another identifier such as the phone number associated with their account in the utility's database. Combined with the signed Letter of Authorization, these two elements would serve to verify the customer's desire to be enrolled with the RES. The RES would submit the alternative identifier with the enrollment request to the utility, in lieu of the account number. The utility would map the identifier to the customer's account number in the database to complete the enrollment process. RESA recommends Staff include this process in their proposed rules, or at the very least assign the topic to the collaborative process contemplated by the Commission's Initiating Order in this proceeding.

In its Initial Comments, RESA offered a revised definition of "variable rate" which limited such rates to rates lasting less than three months. Staff argues that its six-month limitation should be retained because "it is reasonable to assume that consumers expect rates which are described as 'fixed' to remain fixed for longer periods than three months". (Staff VRC, pp. 12-13) However, Staff offers no support for its assumption and as RESA has explained that, considering the onerous requirements proposed by Staff, the AG and CUB with respect to variable rates in proposed new Section 412.170, it is appropriate to limit their applicability to contracts where prices are fixed for less than three months as recommended by RESA.

Section 412.110, Minimum Contract Terms and Conditions

RESA's Verified Reply Comments opposed CUB's proposal that the Commission modify Section 412.110 to eliminate the ability of RESs to offer automatic renewal of contracts to customers on the bases that CUB's proposal violates both the Illinois Automatic Contract Renewal Act (801 ILCS 601/1 *et seq.*) and Section 16-119 of the PUA. NAE also opposes CUB's proposal for similar and other reasons. (NAE VRC, pp. 3-4) CUB's proposal should be rejected.

The AG opposes RESA's recommendation to delete Staff's proposed requirement that contract terms be stated in a standard order. (AG VRC, pp. 8-9) In response to RESA's statement that Staff has provided no basis for this requirement and that it would impose additional costs on RESs, the AG claims that Staff explained that its "proposal is warranted because customers would benefit if contract terms are presented in a consistent manner". (*Id*., p. 9) However, the AG's claim makes no sense. The customer is looking at one contract from one RES—why does it help that customer that the RES' contract is consistent with those of other RESs? In support of its proposed requirement, Staff states the contract terms are ordered in a "sequence that in Staff's opinion is calculated to aid customers in reaching an informed decision regarding the contract". RESA restates its position that Staff's unsupported "opinion" does not provide sufficient basis for a requirement that would impose the additional costs on RESs by requiring them to revise sales contracts already on file with the Commission's CSD, contracts that may be **standard** for a RES which operates in multiple jurisdictions.

Section 412.115, Uniform Disclosure Statement

In its Verified Reply Comments, RESA opposes the AG's proposal to add an additional requirement to the UDS—a requirement that for variable rate products, the UDS must state the current rate per kWh as well as a one-year history of the product or for the life of the product if it has been offered for less than a year. (RESA VRC, p. 15)NAE also opposes the AG's proposal. (NAE VRC, p. 4) The Commission should reject the AG's proposal.

Staff continues to support its proposal that the UDS be limited to the matters listed in the Staff's Attachment A to its Reply Comments. (Staff VRC, p. 22) Staff argues that a UDS "should be a compact summary of the relevant features and disclosures associated with each RES offer". (*Id*.) However, by limiting disclosures, Staff's UDS form would not provide such a summary. For example, if the offer were for a renewable energy product, the RES would be prohibited from including this on the UDS and the fact that the RES is offering a renewable energy product is certainly a relevant feature which should be disclosed.

In its Verified Reply Comments, Ethical suggests, as an alternative, the use of a Schumer Box and states that as long as the information provided therein includes the information required by Staff's Proposed Section 412.115, RESs should be able to add other pertinent information. (Ethical VRC, pp. 19-20) RESA agrees that this proposal is superior to Staff's proposal.

Staff describes RESA's comment that Staff's prohibition of additional information on a UDS is a violation of commercial free speech rights as an "off hand comment" lacking legal support. That support is the U.S. Constitution. Staff's apparent argument that Section 16-117 (h) of the Public Utilities Act, which authorizes the Commission to adopt a UDS, allows the Commission to violate constitutional rights has to be rejected. (Staff VRC, p. 23)

Section 412.120, In-person Solicitation

Staff states that NAE, RESA, and ICEA do not advance any proposal regarding how in-person sales, other than door-to-door, should be enrolled and verified and urges them to advance any proposals they might have to govern in-person marketing other than door-to-door. (Staff VRC, p. 31) Attachment A to these Surreply Comments sets forth RESA's proposal for a new Section 412.125, which sets forth appropriate disclosure requirements for in-person solicitations other than door-to-door solicitations, which would continue to be covered by Section 412.120.

Both the AG and CUB propose additional requirements for in-person solicitation, however, for the reasons stated in RESA's Verified Initial Comments, the current Section 412.120, Door-to-Door Solicitation, should not be revised. In particular, CUB's proposal to require sales agents to wear a video recording device would be very costly. Moreover, as NAE point out, it would raise questions regarding a customer's privacy. (NAE VRC, p. 5)

Staff accepts part of ICEA's proposed revision to Section 412.120 (a), but only the part that would allow the RES to state that it offers power and energy service within a particular utility's service territory and may reference that customers may choose their electricity supplier in the customer's utility service territory. (Staff VRC, pp. 32-33) Staff suggests that this language could result in a "misunderstanding". (*Id.*, p. 33) RESA disagrees. RESA opposes any marketing that attempts to mislead a customer into believing that the RES is or represents the electric utility. However, in RESA's opinion, a statement such as "ComEd will continue to provide your delivery service" is much more informative than a statement that "your electric utility will continue to provide your delivery service", and cannot be reasonably construed to suggest that the RES is the utility or represents the utility.

Section 412.130, Telemarketing

Staff seeks comments from suppliers on the costs and feasibility of CUB's proposal to increase the retention period under Section 412.130 (g) to ten years. (Staff VRC, p. 50) There will be a cost for retaining records for ten years, a cost that will vary by supplier. However, the more important point here is that the number of ten years is completely arbitrary and CUB offered no support for proposing that time period. (CUB VIC, eighth page)

CUB supports Staff's proposal to require RESs to retain records of sales calls for a period of two years or the length of the relationship with the customer, whichever is longer. (CUB VRC, ninth page) CUB provides the following inapt example-a customer who signs up for a three-year fixed rate that then converts to a variable rate. (*Id*.) However, Staff's proposal, supported by CUB, is not limited to the length of the term of the initial contract. If a customer remained a RES customer for 20 years, under numerous contract renewals, the RES would still be required to maintain that original sales call.

Section 412.140, Inbound Enrollment Calls

Staff opposes RESA's position that the retention period for recordings under proposed subsection 412.140 (c) should be one year, stating that the one-year requirement is inconsistent with the two-year period for filing complaints under Section 9-252 of the Act. (Staff VRC, p. 54) However, once again Staff is relying on a section of the Public Utilities Act that only applies to utilities. Section 9-252 states, in relevant part:

> Sec. 9-252. When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due

> reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount. (emphasis added)

Staff also disagrees with RESA that the Commission has no authority to expand protections embodied in Section 2EE of the Consumer Fraud act, relying on the Fourth District Appellate Court's opinion in *Dominion Retail*. (*Id*.) RESA demonstrated previously, in Section III of these Reply Comments, Staff has overstated the significance of *Dominion Retail* in this proceeding. With respect to the specific issue here, *Dominion Retail* does not provide the Commission with authority to say that an enrollment that is valid under Section 2EE of the Consumer Fraud Act is no longer valid.

The AG's and CUB's proposals to add requirements and restrictions for inbound enrollment calls should be rejected for the reasons set forth in the Verified Reply Comments of RESA (RESA VRC, pp. 15-16) and NAE (NAE VRC, pp. 5-6). Staff requests that parties comment on what costs and benefits might be entailed by the AG's proposal that recordings of in-bound enrollment calls that do not result in an enrollment be saved for six months. (Staff VRC, p. 51) These proposals evince a lack of understanding of call center dynamics. Customer service centers receive thousands of in-bound calls initiated for a multitude of reasons. The proposals presume the customer service representative can divine upon onset of the call whether the call, which may be initiated for any number of reasons, will result in a discussion concerning enrollment. The cost of data storage capabilities and maintenance of supporting systems cannot be justified if no enrollment ultimately occurs.

Section 412.170 Rate Notice to Customers

Staff notes RESA's concern that proposed subsection 412.170 (f) appears to require a RES to advise a customer of how he or she can avoid a contract requirement that switches the customer from a fixed to a variable rate even though there may be no way to avoid that requirement. Staff proposes to modify subsection 412.170 (f) (3) as follows:

> A statement in bold lettering, in at least 12 point type, that the rate will change to a variable ~~rate unless the customer takes a certain action, including the information as to how to take certain action~~. If the customer is eligible for one or more fixed rate offers from the RES, the RES shall include information about such offer(s), including the information as to how to enroll in such offer(s). If the customer is not subject to an early termination fee after the switch to a variable rate, the notice shall advise the customer of such.

Staff's proposed modification is an improvement over its original language.

The AG opposes RESA's recommendations regarding Staff's proposal to add a new section, Section 412.170 (Rate Notice to Customers). In support of its position, the AG offers a completely inapt analogy—gas stations being allowed to not post prices until after they have filled their tanks. (AG VRC, p. 14) A true analogy would be that if the Commission regulated gas stations, they should be required to post their prices at the pump a month in advance. RESA submits that such a requirement would ignore the realities of the market place for gasoline (everyone has seen gasoline prices go up by 20% or more overnight), just as RESA has argued that the Staff's proposed disclosure requirements for variable rates ignores the realities of the market place for electricity.

CUB also opposes RESA's recommendations regarding Section 412.170 and claims that RESA "ignores the significant consumer reaction to the spike in variable rates in the wake of the polar vortex". (CUB VRC, pp. 9-10) CUB's claim actually shows another problem with Staff's

proposal. No RES would have been able to predict the polar vortex or the increases in its costs because of that situation. CUB apparently wants to make variable rates risk-free—that is the function of fixed rates, which carry a premium because of that protection.

RESA agrees with NAE that the proposed revisions to Section 412.170 offered by the AG and CUB should be rejected. (NAE VRC, pp. 6-7)

Staff agrees with CUB's position that Subsections 412.170 (a)-(d) should apply to fixed rate contracts that change to variable rates after the initial term. (Staff VRC, pp. 70-71) RESA disagrees. Changes to a contract after the additional term are covered by Section 412.240, Contract Renewal, which requires notices consistent with that section and the Illinois Automatic Contract Renewal Act. Thus, CUB's proposal is redundant and unnecessary.

Staff disagrees with RESA's position, also held by ICEA, that the requirement for historical rates in Subsection 412.170 (g) serves no useful purpose because that requirement "will give customers a high level comparison of actual variable rates charged by the various suppliers before enrolling with one of them". (Staff VRC, pp. 71-73) RESA has repeatedly explained that providing historical prices does not provide useful information to customers. Staff offers a simplistic hypothetical example of rate offers from four suppliers and its proposed historical price info for each supplier for the previous 12 months. RESA's review of the information shown for the four suppliers provides nothing of value to the customer in making a decision of what offer to accept. Certainly there is nothing that would help the customer predict which supplier would provide him or her with the lowest costs in the future.

Section 412.175, Training of RES Agents

In its Verified Reply Comments, RESA opposed the AG's proposed revisions, which were supported by CUB, to Section 412.175. NAE offers similar and additional reasons why the AG's proposed revisions should be rejected. (NAE VRC, pp. 7-8)

Section 412.190, Renewable Energy Product Descriptions

At page 77 of Staff's Reply Comments, Staff offers revised versions of subsections (c) and (e) of Section 412.190. If the Staff would make comparable revisions in Subsection 412.190 (b), RESA would find Staff's modifications acceptable.

The AG, in its Verified Reply Comments, also proposes certain revisions to its version of Section 412.190, Renewable Energy Product Descriptions, including a new subsection (g) "designed to address the problem raised by ICEA and RESA in their respective Initial Comments". (AG VRC, pp. 15-19) However, from RESA's perspective, the AG's proposed revisions do not solve the problems raised by RESA and the Commission should reject the AG's revised Section 412.190.

Like the AG, ELPC offers "alternative disclosure requirements" to address the "feasibility" concerns of RESA and ICEA. (ELPC VRC, pp. 8-9) However, as with the AG's proposals, ELPC's alternative does not satisfy RESA's concerns.

Section 412.210, Rescission of Sales Contract

In its Verified Reply Comments, RESA opposed the AG's proposal, as endorsed by CUB, to modify Section 412.210, Rescission of Sales Contract. (RESA VRC, p. 18) NAE offers additional reasons why the AG's proposed modifications are unnecessary and

inappropriate. (NAE VRC, pp. 8-9) The Commission should reject the AG's proposed modification to Section 412.210.

Section 412.230, Early Termination of Sales Contract

For the reasons stated in the Verified Reply Comments of RESA (RESAS VRC, p. 18) and NAE (NAE VRC, p. 9), the AG's attempts to add even more restrictions beyond those added recently by the General Assembly are without merit and should be rejected. Moreover, adding restrictions not supported by clear specific legislative power may render such provisions beyond the authority of the Commission to order.

Section 412.240, Contract Renewal

For the reasons stated in the Verified Reply Comments of RESA (cite) and NAE (NAE VRC, pp. 9-10), the AG's proposed modifications to Section 412.240 are unnecessary and inappropriate. The AG's proposed revisions should be rejected.

ELPC supports CUB's recommendation that basically eliminates automatic renewal of contracts. (ELPC VRC, pp. 9-10) However, CUB's recommendation would violate the Illinois Automatic Contract Renewal Act and Section 16-119 of the Public Utilities Act.

Section 412.320, Dispute Resolution

In its Verified Reply Comments, RESA recommended that the AG's proposed modifications to Section 412.320 be rejected as they would provide no benefit to the customer, the RES, nor the Commission's Consumer Services Division. (RESA VRC, p. 19) NAE also

opposes the AG's proposed modifications to Section 412.320 for similar reasons. (NAE VRC, pp. 9-10) The Commission should reject the AG's proposed modifications to Section 412.320.

VII. PART 453

Staff states that it appreciates RESA's proposed addition to the definition of electronic signature to include digitized recording of the handwritten signature of the executing person, but that RESA did not explain how this could be accomplished in the context of internet enrollments nor how disputes regarding authenticity would be handled. Staff requested additional comments from RESA in order to decide its position. (Staff VRC, p. 80) Staff also urges RESA, along with ICEA and NAE, to propose a provision which authorizes the use of secure electronic signatures within the meaning of Section 10-110 of the Electronic Commerce Security Act. (*Id*., p. 81) In response to RESA's proposal that a digitized version of the handwritten signature of the executing person is self-authenticating, Staff states that RESA does not suggest how this might be accomplished in the context of internet enrollments nor how disputes regarding authenticity of such enrollments might be resolved. Staff urges RESA to address its concerns. (*Id*., p. 82)

RESA has suggested that digitized signature recordings be among authenticating options. This capability is determined by the capabilities of both the ARES and hardware at the point of sale. RESA envisions this self-authentication to be incorporated into additional technological capabilities designed to manifest and confirm customer intent. ARES can provide customer access to hardware that contains electronic signature capability. Moreover, to confirm customer consent, copies containing the digitized signature can be electronically mailed to the customer at an email address provided by the customer and the time and location of the sale can be geo-located and recorded to verify physical customer interaction.

RESA proposes that, given the time constraints of this proceeding and the numerous (and sometimes conflicting) proposed revisions to Staff's proposed revisions in Part 412, that issues relating to electronic enrollments that are not agreed to by all parties be deferred to the collaborative process contemplated by the Commission's Initiating Order in this proceeding. This will allow time for the parties to discuss highly technical issues relating to electronic enrollments.

VIII. ATTORNEY GENERAL'S PROPOSED NEW SECTIONS TO PART 412

Section 412.XXX, General Disclosure Requirements

For the reasons stated in RESA's Verified Reply Comments (RESA VRC, pp. 19-20) and NAE's Verified Reply Comments (NAE VRC, p. 10), there is no need for the AG's proposed new section and the Commission should reject the AG's proposal.

Section 412.XXX, Use of Utility Name or Logo Prohibited

In its Verified Reply Comments, RESA stated that the additional requirements suggested by the AG in its proposed new section are overkill and unnecessary and should be rejected by the Commission. (RESA VRC, p. 20) NAE states additional reasons in its Verified Reply Comments. (NAE VR, pp. 10-12) The Commission should reject this new section proposed by the AG.

Section 412.XXX, Supplier Liability for its Agent

ComEd supports the AG's proposed new section, Supplier Liability for its Agent, while acknowledging that that section is inconsistent with "applicable law governing principal-agent liability", and without offering revisions to fix it. (ComEd VRC, p. 6) To do that, the section

should be rejected in its entirety. As NAE points out, Illinois agency law generally provides that a principal is responsible for the acts of its agents. (NAE VRC, p. 12)

Section 412.XXX, Acceptance of Transferred Utility Calls Prohibited

For the reasons set forth in the Verified Reply Comments of RESA (RESA VRC, pp. 20-21) and NAE (NAE VRC, pp. 13-14), the Commission should reject this additional section proposed by the AG, which would actually result in a disservice to customers, by eliminating a convenient one-stop shopping option.

Section 412.XXX, Vagueness, Ambiguity, or Obscurity of Contract Terms Construed in Favor of the Customer

As explained in the Verified Reply Comments of RESA (RESA VRC, p. 21) and NAE (NAE VRC, p. 14), the AG's proposed new section is unnecessary and redundant. The Commission should reject the AG's proposal.

IX. CONCLUSION

RESA appreciates the opportunity to submit these Verified Surreply Comments on Staff's Proposed Rules. RESA requests that the Administrative Law Judges take them, as well as RESA's Verified Initial Comments, including attached Appendices A and B thereto, and its Verified Reply Comments and reflect them in the proposed first notice rules.

Respectfully submitted,

s/s GERARD T. FOX
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NOTICE OF FILING

Please take note that on December 3, 2015, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Verified Surreply Comments of the Retail Energy Supply Association in this proceeding.

/s/GERARD T. FOX
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I caused to be served copies of the foregoing Verified Surreply Comments of the Retail Energy Supply Association upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for Ill. C. C. Docket 15-0512 via electronic delivery on December 3, 2015.

/s/ GERARD T. FOX

Gerard T. Fox